

DOCKET NO. HHD-LND-CV22-6164019-S	:	SUPERIOR COURT
	:	
TOWN OF NEW CANAAN	:	J.D. OF HARTFORD
	:	
VS.	:	LAND USE LITIGATION
	:	DOCKET
	:	
STATE OF CONNECTICUT,	:	
DEPARTMENT OF	:	
HOUSING	:	JANUARY 27, 2023

**STATE OF CONNECTICUT DEPARTMENT OF HOUSING’S**  
**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

The Defendant, State of Connecticut, Department of Housing (“DOH”), moves pursuant to Practice Book § 10-30 and § 10-33 to dismiss the administrative appeal filed by the Town of New Canaan for lack of subject matter jurisdiction. This Court lacks subject matter jurisdiction because the Town has not appealed from a final decision in a contested case.

**I. Relevant Jurisdictional Facts**

In 2017, the Town applied for a certification of affordable housing completion (also known as a moratorium pursuant to Conn. Gen. Stat. § 8-30g. Complaint ¶ 1. In the 2017 application, the Town claimed housing unit equivalent (HUE) points from two out of thirty-three completed units at the Millport Apartments development. Complaint ¶ 3. DOH granted the moratorium and it was in effect for the four-year period provided by statute. Complaint ¶ 2, ¶ 3. The Town alleges that in approving the 2017 moratorium, DOH stated that the remaining 31 units at Millport Apartments “will be claimed in a future application.” Complaint ¶ 3; Complaint Exhibit A.

The Town’s moratorium expired on June 5, 2022. Complaint ¶ 4. Between 2017 and 2022, the Town continued to increase its affordable housing stock. Complaint ¶ 5. The Town applied for a subsequent moratorium on July 21, 2022. Complaint ¶ 6. In the application, the Town claimed a total of 87 units from two developments for a total of 152.5 HUE points. Complaint ¶ 7. DOH verified that the Town required 151.02 HUE points to qualify for a subsequent moratorium,

Complaint ¶ 8. The Town claimed 31 units left over from 2017 that had already been completed at Millport Apartments before the first moratorium. Complaint ¶ 9.

On October 18, 2022, DOH denied the moratorium application. Complaint ¶ 10. DOH determined that the Town could not claim the 31 units left over from 2017 because those units had been completed prior to DOH's issuance of the Town's 2017 moratorium, and thus, could not be counted pursuant to Conn. Gen. Stat. § 8-30g(l)(3). *See* Complaint ¶ 10, ¶ 11. The Town claimed that DOH's denial of the application is unlawful. *See* ¶ 12. The Town does not allege that DOH was required to hold a hearing on the moratorium application. *See generally* Complaint. The Town appealed pursuant to Conn. Gen. Stat. § 4-183(b).

## **II. Standard of Review**

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction. . . . *Gerlt v. South Windsor*, 284 Conn. 178, 188-89 (2007) (internal citations and quotation marks omitted).

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . ." *Stefanoni v. Dep't. of Econ. & Cmty. Dev.*, 142 Conn. App. 300, 306 (2013). "Once the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented. . . The court must fully resolve it before proceeding further with the case." *Feliciano v. State*, 336 Conn. 669, 674 (2020). "Any claim of lack of jurisdiction over the subject matter cannot be waived; and whenever it is found after suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the

judicial authority shall dismiss the action." *Cuozzo v. Town of Orange*, 315 Conn. 606, 610 n.3 (2015) (quoting Practice Book § 10-33).

The standard of review for a motion to dismiss for lack of subject matter jurisdiction is well established. The court must grant the motion if, when viewed in the light most favorable to the plaintiff, the allegations of the complaint fail to state a claim within the court's subject matter jurisdiction. *See Browning v. Van Brunt, Dubiago & Co., LLC*, 330 Conn. 447, 457 (2018). "In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Columbia Air Servs., Inc. v. Dep't of Transp.*, 293 Conn. 342, 347 (2009). This Court may properly consider the attached exhibits to the Complaint in ruling on the motion to dismiss because "[a] complaint includes all exhibits attached thereto." *Tracy v. New Milford Pub. Schools*, 101 Conn. App. 560, 566 (2007).

### **III. Argument**

Not all agency decisions are appealable and the right to appeal from administrative agencies are limited by statute. *See Town of Canterbury v. Rocque*, 78 Conn. App. 169, 174 (2003) "The UAPA grants the Superior Court jurisdiction over appeals of agency decisions only in certain limited and well delineated circumstances." *New England Dairies, Inc. v. Comm'r of Agriculture*, 221 Conn. 422, 427 (1992). Specifically, "a party may appeal to the Superior Court only from a final decision in a contested case as provided in §§ 4-183 and 4-166 [4] and [5]." *Town of Middlebury v. Dep't. of Env'tl. Prot.*, 283 Conn. 156, 163 (2007). A contested case is a proceeding "in which an agency is *required by statute* to provide an opportunity for a hearing to determine a party's legal rights or privileges." *Summit Hydropower Partnership v. Comm'r of Env'tl. Prot.*, 226 Conn. 792, 811 (1993) (emphasis in original). The test for determining a contested case requires this Court to consider: "(1) whether a legal right, duty or privilege is at issue, (2) and is statutorily

required to be determined by the agency, (3) through an opportunity for hearing or in which a hearing is in fact held.” *High Watch Recovery Ctr., Inc. v. Dep’t. of Pub. Health*, 207 Conn. App. 397, 409 (2021).

Furthermore, while the UAPA allows limited interlocutory appeals under § 4-183(b), the statute requires an appellant to establish that it is “likely that the person will otherwise qualify under this chapter [UAPA] to appeal from the final agency action or ruling.” *See* Conn. Gen. Stat. § 4-183(b), *see also Smulley v. Dep’t of Educ.*, Docket No. HHB-CV21-6068801-S, 2022 Conn. Super. LEXIS 85, at \*5 n.5 (Conn. Super. Ct. Jan. 19, 2022) (noting § 4-183(b) requires appellant bringing interlocutory appeal show it will qualify to appeal from a final agency action or ruling).

**A. Neither Statute Nor Regulation Requires DOH to Hold a Hearing on an Affordable Housing Moratorium Application.**

Conn. Gen. Stat. § 8-30g(l) governs the moratorium application process. The statute provides that the Commissioner shall decide the moratorium application based on the written submissions of the applicant and the public comments, if any, submitted during the thirty-day comment period. The statute does not require DOH to hold a hearing.

Nor does the applicable regulation that the Town cites, Conn. Agencies Regs. § 8-30g-6. The regulation lists the documents a municipality must submit with its moratorium application and clarifies the procedure it must follow for notice and public comments. The regulation requires a municipality to provide notice in the Connecticut Law Journal of its intent to apply to DOH for a moratorium. The regulation also requires the Town to provide notice that the application shall be available in the municipal clerk’s office for review, and that members of the public may submit comments to the municipality. If during that public comment period, 25 residents of the municipality file a petition with the municipal clerk requesting a public hearing, then “either the *municipality's legislative body or its zoning or planning commission* shall hold such a hearing.”

Conn. Agencies Regs. § 8-30g-6. There is no similar requirement that DOH hold a hearing after the public comment period before the agency in Conn. Gen. Stat. § 8-30g. The lack of a requirement for DOH to hold a hearing is dispositive that its decision on the Town's application was not a contested case. *See New England Dairies, Inc. v. Comm'r of Agriculture*, 221 Conn. 422, 427-29 (1992) (no contested case when commissioner of agriculture held hearing on application for milk license, but was not required by statute to do so).

Lastly, Conn. Gen. Stat. § 4-183(b) does not support the Town's appeal. That section is limited to when "the agency has not yet issued a final decision" and it "appears likely that the person will otherwise qualify under . . . chapter [54] to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy." *See Trinity Christian School v. Comm'n on Human Rights & Opportunities*, 329 Conn. 684, 693 (2018). It is a limited provision that allows for interlocutory appeals when the agency will eventually issue a final decision in a contested case. It does not make otherwise unappealable agency actions appealable. Here, DOH has denied the application, but such decision is not a final decision in a contested case. Thus, the Town cannot meet the limited requirements for an interlocutory appeal under § 4-183(b).

## CONCLUSION

For the foregoing reasons, this Court must dismiss the Town's complaint for lack of subject matter jurisdiction.

DEFENDANT

STATE OF CONNECTICUT  
DEPARTMENT OF HOUSING

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## **CERTIFICATION**

I hereby certify that a copy of the foregoing was mailed, first class postage prepaid, or electronically delivered this 27th day of January, 2023, to:

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